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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

SHAFRON & KAMMER, LLP, Plaintiff and Appellant, v. KRANE & SMITH, Defendant and Appellant.	B200392 (Los Angeles County Super. Ct. No. LC067936)

APPEALS from a judgment of the Superior Court of Los Angeles County. Richard B. Wolfe, Judge. Affirmed.

Krane & Smith, Samuel Krane, Marc Smith; Akin Gump Strauss Hauer & Feld, Rex S. Heinke, Katharine J. Galston for Defendant and Appellant.

Shafron & Kammer, Shelly Jay Shafron, Kevin David Kammer, Douglas G. Carroll; Law Offices of Julian A. Pollok, Julian A. Pollok for Plaintiff and Appellant.

This case involves a law firm that was disqualified as clients' counsel because of a conflict of interest, and where the clients' new law firm thereafter refused to honor its written postdisqualification fee-sharing agreement with the clients and the original law firm. The disqualified law firm, plaintiff Shafron & Kammer, LLP (SK), formerly Shafron, Altschuld & Kammer (SAK), sued the successor law firm, defendant Krane & Smith (Krane), alleging causes of action for declaratory relief, breach of contract and unjust enrichment, and seeking, inter alia, monetary damages of over $600,000.

We affirm the summary judgment in favor of SK, but we find unavailing SK's cross-appeal seeking statutory prejudgment interest.

FACTUAL AND PROCEDURAL SUMMARY

This is the third trip for this matter to the court of appeal. First, we affirmed the trial court's order disqualifying SK as counsel in the underlying matter. (*LASVN #2 v. Van Ness and Sperry, Inc.* (Nov. 6, 2001, B143519) [nonpub. opn.].) Second, SK appealed from a judgment of dismissal entered after the trial court sustained Krane's demurrer to the first amended complaint without leave to amend, and we reversed. We found that a client may consent to representation involving a conflict of interest and may waive a conflict of disqualifying counsel and re-engage its prior counsel, that the postdisqualification fee-sharing agreement herein may be enforced (subject to the viability of any defenses), and that the demurrer should not have been sustained. (*Shafron & Kammer, LLP v. Krane & Smith* (Jan. 6, 2006, B180041) [nonpub. opn.] pp. 2, 14-15.)

The present appeal is from a judgment in favor of SK entered after SK's successful motion for summary judgment, which was premised on its contract claim and the fee agreement that we previously found was valid on its face and supported by adequate consideration. (*Id.* at pp. 9-11.) Krane opposed the summary judgment, in pertinent part, on three grounds: (1) that extrinsic evidence supported the parties' unstated understanding that the fee agreement purportedly was effective only if SK prevailed in the appeal from the disqualification order (which it did not), and thus that SK

had no right to share the fees; (2) that Krane was fraudulently misled when SAK represented in the retainer agreement that SAK had discussed disqualification issues with the clients; (3) and that the fee agreement was unenforceable because it allowed SK to recover fees for violating its ethical duties to the client.

As indicated by the trial court's extensive and well-reasoned written tentative ruling, in granting the summary judgment motion the court rejected Krane's first two arguments on the ground that the fee agreement was an integrated agreement, and Krane's arguments were premised on inadmissible parol evidence. Regarding Krane's third argument, the trial court implicitly acknowledged that our prior opinion had previously rejected the notion that SK's disqualification in and of itself barred enforcement of the postdisqualification fee agreement. Also, it noted that SK did not violate any ethical duties to its client.

The trial court thus granted judgment in favor of SK and against Krane. It awarded damages in amount of $635,476.80, plus prejudgment interest in the amount of all the accruing interest in the joint account agreed to by the parties as the repository for the disputed fees. The judgment noted that the accrued interest in the joint account amounted to $33,321.98, as of March 30, 2007, and stated that SK "shall be entitled to any and all additional interest in the Joint Account. To the extent such interest accrues after the date of entry of judgment, this interest shall not be considered prejudgment, and shall simply be credited as payment of the judgment when received by Plaintiff." The court awarded interest on the entire judgment upon entry of the judgment at the rate of 10 percent interest from and after the date of entry of judgment. "The total amount for computing post-judgment interest shall be the sum of the principal plus prejudgment interest as last filed with the court [i.e., $668,798.78] plus the amount of interest accruing in the Joint Account through the date of the entry of judgment plus the untaxed cost award [of $8,794.43]."

Krane appeals, contending that SK was disqualified due to a conflict of interest and that SK failed to prove that equity entitled it to compensation. SK cross-appeals,

seeking prejudgment interest at the statutory 10 percent rate (Civ. Code, § 3291), rather than the interest accrued in the joint account.

DISCUSSION

I. Krane's appeal.

Krane has not raised on appeal the parol evidence issue it unsuccessfully litigated at trial. It has thus abandoned that issue and waived the argument on appeal. (*Humes v. MarGil Ventures, Inc.* (1985) 174 Cal.App.3d 486, 493; see *Pitman v. City of Oakland* (1988) 197 Cal.App.3d 1037, 1048.) Krane raises only two contentions on appeal. First, Krane asserts that the fee agreement is unenforceable as against public policy in that it allows SK to recover fees in violation of Rules of Professional Conduct, rule 3-310(E).[1] Second, Krane argues that it was incumbent on SK to show that it was "equitable" to enforce the fee agreement. Both contentions are without merit.

The law of the case doctrine bars reconsideration of the argument that the agreement to pay SK a portion of the contingency fee is void as against public policy.

It is the "general rule" that an attorney disqualified for a conflict of interest has no right to recover attorney fees for work that violated counsel's ethical obligations. (*A.I. Credit Corp., Inc. v. Aguilar & Sebastinelli* (2003) 113 Cal.App.4th 1072, 1079; see *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 618; Rules of Prof. Conduct, rule 3-310(E).) Krane thus contends that the disqualification order in the present case bars SK's claim to a portion of Krane's recovery. However, in the prior appeal in this matter, in which we reversed the judgment of dismissal following Krane's successful demurrer, we specifically rejected the application of this accurate general statement of the law to the particular circumstances here.

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[1] Rules of Professional Conduct, rule 3-310(E), regarding the avoidance of the representation of adverse interests, provides as follows: "A member [of the bar] shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment."

In our prior opinion, we stated as follows: "Krane demurred to the first amended complaint, urging that SK was not entitled to recover any compensation for legal services addressed in the post-recusal fee agreement. Krane argued that SK could not be compensated for any legal services rendered in violation of the rules of professional responsibility which prohibit counsel's engagement where there is a conflict of interest, absent the informed written consent of the client. (Rules of Prof. Conduct, rule 3-310(E).)" (*Shafron & Kammer, LLP v. Krane & Smith, supra*, at p. 8.) However, "Krane cites no legal authority that prohibits or voids a new agreement entered into between attorney and client after a disqualification order." (*Id.* at p. 8.) "It is well settled that a client may expressly or impliedly consent to adverse legal representation. . . . [¶] Here, the post-disqualification consent to the fee-sharing by the client (the LASVN #2 parties) was in writing, in the form of the signed joint fee agreement, and with knowledge of the prior disqualification and the previously ruled upon conflict of interest. The new fee-sharing contract was thus valid on its face. (See, e.g., Rules of Prof. Conduct, rules 2-200(A), 3-310(E).) This conclusion is consistent with general principles of contract law and attorney-client fee agreements, which encourage construing contracts as enforceable if reasonably possible (Civ. Code, § 1643; see *Lawrence v. Shutt* (1969) 269 Cal.App.2d 749, 761) and generally leave 'the measure and mode of compensation of attorneys . . . to the agreement . . . of the parties.' (Code Civ. Proc., § 1021; see *Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal.App.4th 1338, 1341.)" (*Shafron & Kammer, LLP v. Krane & Smith, supra*, at p. 9.)

The above conclusions of law in our prior opinion are law of the case, which cannot now be relitigated and to which we must adhere. (*Clemente v. State of California* (1985) 40 Cal.3d 202, 211-212; *People v. Shuey* (1975) 13 Cal.3d 835, 841.) Hence, the law of the case doctrine bars Krane's argument in the present case that the joint fee agreement is purportedly unenforceable as a matter of law or policy. Having previously determined that the fee agreement complained of is "valid on its face" and not a violation of the Rules of Professional Conduct, we cannot now conclude that the agreement is a

violation of public policy. Our prior opinion and the doctrine of law of the case prohibit any such conclusion.

Krane's contention that SK failed to prove that it was equitable for SK to recover its contractually agreed upon share of the fee is unavailing.

According to Krane, because SK did not prove equities that entitled it to compensation (or at least that triable issues existed as to such equities), the trial court erred in granting SK's motion for summary judgment. Apart from whether this argument was waived for failure to present it first to the trial court and to plead it as an affirmative defense (see *Waisbren v. Peppercorn Productions, Inc.* (1995) 41 Cal.App.4th 246, 263; *Traxler v. Varady* (1993) 12 Cal.App.4th 1321, 1330-1331), Krane's contention that SK failed to prove equities entitling it to compensation is unavailing.

Krane fundamentally misconstrues our prior opinion, which was merely at the pleading stage following the dismissal of SK's complaint without leave to amend. After holding that Krane had *standing* to challenge SK's right to a share of the fee, our prior decision opined, based on matters suggested by the parties, that "Krane's defense of collateral estoppel based on the prior disqualification order is an equitable defense which need not be applied if considerations of fairness to the litigants dictate otherwise . . . . Collateral estoppel depends not only on the elements of the defense being satisfied, but on principles of fairness relevant to the particular facts warranting its application." (*Shafron & Kammer, LLP v. Krane & Smith*, *supra*, at p. 13.)

However, our prior opinion did not hold that collateral estoppel applied to the present case. We merely concluded that Krane had standing to raise the disqualification issue and could *plead* a defense of collateral estoppel, noting the legal parameters of such a defense. We did not and could not in that prior appeal decide whether any defense Krane might raise could withstand a direct legal bar, such as the parol evidence rule, the Rules of Professional Conduct, rule 2-200 (permitting a fee-sharing arrangement if client consents in writing after full disclosure, etc.), and Business and Professions Code section

6147 (requiring all contingency fee agreements to be in writing, etc.) because those issues were not before us.

We hold now that the equitable issues Krane raises cannot support a reversal of the judgment. Equitable doctrines cannot be used to deny a legal right to a judgment where a legal entitlement exists. Equitable powers must be exercised pursuant to the principle that "equity follows the law." (*Johnson v. Tago, Inc.* (1986) 188 Cal.App.3d 507, 518.) A party cannot gain new substantive rights """'under the guise of doing equity'"" (*Wal-Noon Corp. v. Hill* (1975) 45 Cal.App.3d 605, 613), because by definition it would be inequitable to imply an obligation different from the parties' agreement. (*Hedging Concepts, Inc. v. First Alliance Mortgage Co.* (1996) 41 Cal.App.4th 1410, 1419.)

"One who violates his contract cannot have recourse to equity to support that very violation." (*Gavina v. Smith* (1944) 25 Cal.2d 501, 506.) "The reason for the rule is simply that where the parties have freely, fairly and voluntarily bargained for certain benefits in exchange for undertaking certain obligations, it would be inequitable to imply a different liability . . . ." (*Wal-Noon Corp. v. Hill*, *supra*, 45 Cal.App.3d at p. 613.)

Accordingly, equitable doctrines cannot negate SK's contractually agreed upon 25 percent contingency fee share. Krane's arguments seeking to abandon the fee agreement's requirement of a 75 and 25 percent fee share between the two firms for some implied bar to SK's recovery, or for an equitable reduction of SK's 25 percent share, are without merit. As previously discussed, SK's disqualification did not automatically bar enforcement of the subsequent postdisqualification fee agreement. That subsequent agreement is a legal contract not subject to the application of equitable principles.

II. SK's cross-appeal.

SK cross-appeals and seeks approximately $200,000 in prejudgment interest on the sum of money that was deposited in a joint account pending resolution of this action. Soon after this litigation started, the parties signed a written agreement providing that upon Krane's receipt of its contingency fee in the underlying action, it would notify SK and deposit the disputed amount in a joint bank account or time certificate of deposit.

The written agreement further specified that the account would have Krane's tax identification number, that the funds could be withdrawn only upon a joint withdrawal request or a court order, and that the agreement was "without prejudice to any rights or entitlements" of either Krane or SK.

SK relies on the language in the agreement that it was "without prejudice to any rights or entitlements" to support its argument that it intended to preserve its right to the statutory 10 percent rate of interest under Civil Code section 3287, subdivision (a). Krane argues that such boilerplate language in the agreement indicated merely that notwithstanding the parties' deposit of the disputed funds, their dispute continued. Apart from whether that interpretation is valid, there is no statutory support for SK's position.

Civil Code section 3287, subdivision (a), provides as follows: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, *except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt.*" (Italics added.) Thus, the creditor is not entitled to interest during the time the debtor is prevented from making payment. For example, where the creditor has directed the debtor-defendant not to pay a debt pending resolution of an action, there can be no liability for interest under section 3287, subdivision (a). (*Perkins v. Benguet Cons. Min. Co.* (1942) 55 Cal.App.2d 720, 767-771 [counsel had instructed defendant to hold all dividends until a specified judicial conflict was resolved].)

Moreover, the statutory interest provision is intended to compensate for a defendant's "wrongful detention of money due to plaintiff." (*Distefano v. Hall* (1968) 263 Cal.App.2d 380, 388.) Here, however, Krane was not wrongfully withholding payment of the disputed amount. The parties specifically agreed that Krane would deposit it into a joint account and not pay it out to SK while the litigation was ongoing, absent a joint withdrawal request or court order. The situation is akin to where there is an agreement to deposit money with the court, an arrangement that affords no right to

prejudgment interest. (*Bank of China v. Wells Fargo Bank & Union Trust Co.* (9th Cir. 1953) 209 F.2d 467, 472, 476; see also *Perkins v. Benguet Cons. Min. Co.*, s*upra*, 55 Cal.App.2d at p. 769.) Accordingly, Civil Code section 3287, subdivision (a), does not apply, and SK was not entitled to the statutory rate of interest.

Finally, there is no merit to SK's other interest-related argument that the trial court's judgment was fatally flawed because the interest stated did not reflect a true and accurate award of postjudgment interest. According to SK, because the judgment awarded interest accrued in the joint account as of March 30, 2007, plus "any and all additional interest in the Joint Account" as of the entry of the judgment (June 12, 2007), but the judgment did not specify the exact amount of interest earned between April 1 and June 12, 2007, SK's right to postjudgment interest was somehow impaired. However, both parties knew or had access to information from which to determine the amount of interest accrued in the account between April 1 and June 12, 2007, and SK could have informed the trial court of the exact amount (and it no doubt will do so prior to execution of judgment). Under the circumstances, the judgment adequately reflects "any interest awarded by the court and the interest accrued since the entry of the verdict." (Cal. Rules of Court, rule 3.1802.)

Thus, there is no illegality or other flaw as to the interest awarded in the judgment.

DISPOSITION

The judgment is affirmed. Each party is to bear its own costs on appeal.

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BOREN, P.J.

We concur:

DOI TODD, J. CHAVEZ, J.